IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

SCOTT A. CLARK AND LIZA P. CLARK, HUSBAND AND WIFE,
Plaintiffs/Appellants,

v.

SANDRA G. SIGMON-MCBRIDE AND PHILLIP MCBRIDE,
WIFE AND HUSBAND; AND
MORTGAGE ELECTRONIC REGISTRATION SYSTEMS, INC.,
A DELAWARE CORPORATION,
Defendant/Appellees.

No. 2 CA-CV 2017-0208
Filed November 21, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20165545
The Honorable Gus Aragón, Judge

VACATED AND REMANDED

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MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Judge Brearcliffe and Judge Espinosa concurred.

E C K E R S T R O M, Chief Judge:

¶1 Appellants Scott and Liza Clark (collectively "the Clarks") assert the trial court erred in dismissing their claims of express easement, granting summary judgment in favor of Appellees Sandra Sigmon-McBride, Phillip McBride, and Mortgage Electronic Registration Systems Inc. (collectively "the McBrides") on their claim for prescriptive easement, and granting the McBrides' request to quiet title. The Clarks also contest the trial court's grant of attorney fees in favor of the McBrides. For the following reasons, we vacate the judgment of the trial court and remand for further proceedings consistent with this decision.

Factual and Procedural Background

¶2 "In reviewing a trial court's ruling on a motion to dismiss for failure to state a claim, we will assume all the facts alleged in the complaint are true." *Republic Nat'l Bank of N.Y. v. Pima County*, 200 Ariz. 199, ¶ 2 (App. 2001). Similarly, in reviewing a grant of summary judgment, we view the facts in the light most favorable to the non-moving party. *Tilley v. Delci*, 220 Ariz. 233, ¶ 7 (App. 2009).

¶3 In October of 2000, the Clarks purchased a parcel of land near Tucson, Arizona, intending to eventually build their home on it. The Clarks had water service installed on the lot in 2001. Although the Clarks frequently visited the property, they did not begin construction of their residence until 2007 and did not live on the property until the residence was completed in 2008. From the time the Clarks purchased the property until

2016, they used a dirt driveway partially on the McBrides' property to access their land ("the Driveway").

¶4 In July 2016, Sandra Sigmon-McBride and Phillip McBride blocked access to the Driveway. The Clarks filed a complaint alleging a prescriptive easement over the Driveway and later amended their complaint to include a claim of an express easement. The trial court granted summary judgment as to the prescriptive easement claim, dismissed the claim of express easement, and awarded the McBrides their attorney fees. The Clarks appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21 and 12-2101(A)(1).

Express Easement

¶5 The Clarks assert the trial court erred in granting the McBrides' motion to dismiss their claim for express easement. "We review an order granting a motion to dismiss for abuse of discretion." *Dressler v. Morrison*, 212 Ariz. 279, ¶ 11 (2006).

¶6 In July 1955, Bert Calvert conveyed the property that now belongs to the McBrides to John and Theresa McQuilkin. The deed conveying the property states that the parcel is "subject also to the following reservations, conditions and restrictions, each and all of which is and are for the benefit of each parcel of land in [the subdivision]." The deed goes on to state

> [T]he parcel of land hereby conveyed is subject to said restrictions of use as follows:
>
> 1. No building or other structure shall be erected on the premises hereby conveyed unless it be of brick, concrete, adobe block or other masonry construction.
>
> 2. To insure bridle paths, roadways and utility easements throughout said [subdivision], no residence, garage, stable, or other building and no wall fence, hedge or coping shall be erected or maintained within fifty feet of any property line of the parcel of land hereby conveyed or the boundary lines of any subdivisions thereof, excluding however from this restriction the property

> line abutting and bordering upon and parallel to the Old Spanish Trail; a fifty foot easement parallel to the boundary lines of the parcel of land hereby conveyed and parallel to the boundary lines of any subdivision thereof is expressly reserved for the purposes herein-before set out in this paragraph, and also for the purpose of installing any and all public utility lines, poles, pipes or other distribution system or systems.

The deed goes on to state, "Each of the restrictions herein imposed shall continue in full force and effect . . . until January 1, 1997, upon which date said conditions and restrictions shall terminate and end and thereafter be of no further legal or equitable effect on said property or any owner thereof." The trial court concluded that the termination language applied to "reservations, conditions, and restrictions, including the easement in question" and determined "that the easement alleged to exist . . . ended on January 1, 1997 and had no further effect on the McBride[s]'property as of that date."[1] "The interpretation of an instrument is a question of law to be determined by this court independent of the findings of the trial court." *Squaw Peak Cmty. Covenant Church of Phx. v. Anozira Dev., Inc.*, 149 Ariz. 409, 412 (App. 1986). And, "[w]here contract language is susceptible to more than one interpretation, the matter should be submitted to the jury." *State v. Mabery Ranch, Co.*, 216 Ariz. 233, ¶ 28 (App. 2007).

¶7 The opening language of the deed notes that the parcel is "subject . . . to . . . reservations, conditions and restrictions." The termination clause, however, states that it applies to "conditions and restrictions" only. It does not mention reservations. When, as here, the seller of a property retains an easement over the property, that is typically referred to as a "reservation" of an easement. *See, e.g.*, *Siler v. Ariz. Dep't of Real Estate*, 193 Ariz. 374, ¶ 37 (App. 1998); *Squaw Peak*, 149 Ariz. at 412; *see also* 28A C.J.S. *Easements* § 71 ("An 'express easement by reservation' arises when a property owner conveys part of his or her property to another, but includes language in the conveyance reserving the right to use some part of

[1]The Clarks state in their complaint that the Driveway is within fifty feet of the northern boundary of the McBrides' property, and we accept that as true for purposes of this discussion. *Republic Nat'l Bank of N.Y.*, 200 Ariz. 199, ¶ 2.

the transferred land as a right-of-way."). And, the language in this deed states that an easement is "expressly reserved."

¶8 Easements, moreover, are categorically distinct from conditions and restrictions. Easements are defined separately from restrictive covenants in the Restatement (Third) of Servitudes §§ 1.2, 1.3. Given the express language omitting "reservations" from the termination clause, and the distinction between easements and restrictive covenants, we believe the deed could plausibly be interpreted in the manner suggested by the Clarks—the termination clause applies solely to the "conditions and restrictions," and not to the easement.

¶9 We accordingly conclude the deed is reasonably susceptible to two interpretations, and, because it is so susceptible, its interpretation is a question for a jury. *Cf. Mabery Ranch, Co.*, 216 Ariz. 233, ¶ 28. We cannot agree with the trial court that the Clarks "would not be entitled to relief under any facts susceptible of proof in the statement of the claim." *Dressler*, 212 Ariz. 279, ¶ 11 (quoting *Mohave Disposal, Inc. v. City of Kingman*, 186 Ariz. 343, 346 (1996)). The court therefore erred in granting the McBrides' motion to dismiss.[2]

Prescriptive Easement

¶10 The Clarks also claim the trial court erred in granting the McBrides' motion for summary judgment on their claim of prescriptive easement. "We review de novo the grant of a motion for summary judgment." *Kopacz v. Banner Health*, 245 Ariz. 97, ¶ 8 (App. 2018). Summary judgment is appropriate only when there is no genuine dispute as to any material fact and the moving party is entitled to judgment as a matter of law. *Normandin v. Encanto Adventures LLC*, 245 Ariz. 67, ¶ 7 (App. 2018).

¶11 "A party claiming an easement by prescription 'must establish that the land in question has actually and visibly been used for ten years, that the use began and continued under a claim of right, and [that] the use was hostile to the title of the true owner.'" *Spaulding v. Pouliot*, 218 Ariz. 196, ¶ 14 (App. 2008) (alteration in *Paxson*) (quoting *Paxson v. Glovitz*,

[2]The Clarks also cite to certain parol evidence they claim supports their interpretation of the deed. The McBrides argue the evidence offered is not proper because it does not reflect the intent of the parties to the deed. The trial court did not resolve this issue because it concluded the deed was not susceptible to the interpretation proposed by the Clarks. We leave this issue to be resolved by the trial court in the first instance.

203 Ariz. 63, ¶ 22 (App. 2002)). The trial court concluded that the prescriptive period did not begin running until the Clarks' home was completed in August 2008. It determined that the land was not used for "residential purposes" until that point and that therefore the Clarks could not establish use over a ten-year period.

¶12 A party seeking to establish an easement by prescription must show continuous use for ten years. *Id.* "[A]ny material change in [the] use [of the easement] during the prescriptive period interrupts and may prevent the acquisition of the right." *United States v. 42.12 Acres of Land*, 554 F. Supp. 1039, 1041 (W.D. Mo. 1983); *cf. Inch v. McPherson*, 176 Ariz. 132, 136 (App. 1992) ("The scope of a prescriptive easement is determined by the use through which it was acquired."). In determining whether the nature of the use of an easement has changed, we compare the different uses, including "their physical character," "their purpose," and "the relative burden caused by them upon the servient tenement." Restatement (First) of Property § 478; *see, e.g.*, *Wright v. Horse Creek Ranches*, 697 P.2d 384, 388-90 (Colo. 1985); *Firebaugh v. Boring*, 607 P.2d 155, 161 (Or. 1980); *see also Inch*, 176 Ariz. at 136 (easement to park car on neighbor's property did not allow building a block wall to prevent interference with easement); *Lerner v. DMB Realty, LLC*, 234 Ariz. 397, n.7 (App. 2014) ("In the absence of contrary Arizona authority, we follow the Restatement of the Law."). "[T]he purpose of the use is only one of the factors to be considered." *Pipkin v. Der Torosian*, 111 Cal. Rptr. 46, 49 (App. 1973). "If the change is not in the kind of use, but merely one of degree imposing no greater burden on the servient estate, the right to use the easement is not affected." *Gaither v. Gaither*, 332 P.2d 436, 438 (Cal. App. 1958).

¶13 The McBrides argue, and the trial court concluded, that when the Clarks built their home in 2008, that constituted a change in the kind of use. The Clarks respond that their use has, essentially, been residential in nature even before they built their home because the property was purchased with the intent of building a residence and their visits to the property were made with the purpose of planning their eventual residence.

¶14 The Clarks presented facts that, if credited, could support a finding that the completion of their residence constituted a change in the degree of use, rather than the kind. *See Gaither*, 332 P.2d at 438. They purchased the property with the intention of constructing a residence. They made frequent visits to the property, at least some of which were for the purpose of planning the eventual construction. They visited at various times of day to observe where the sun would set and rise to help determine how to place their home and brought an architect to visit the site.

¶15 Moreover, the trial court's determination that the "residential" use did not begin until construction of the residence was completed in 2008 forestalled consideration of the Restatement's other two factors: the physical character of the easement and the relative burden placed on the servient estate. Restatement (First) of Property § 478. In determining whether a proposed use of a prescriptive easement is permissible, courts generally look to the extent to which the burden on the servient estate will be increased. *See, e.g.*, *Gibbens v. Weisshaupt*, 570 P.2d 870, 875 (Idaho 1977) (change in use of easement may not "impose a substantial increase or change of burden on the servient tenement."); *Burgess v. Sweet*, 662 S.W.2d 916, 919 (Mo. App. 1983) ("an increase in the number of vehicles using an easement" not a significantly increased burden on servient estate); *Bodman v. Bodman*, 321 A.2d 910, 912-13 (Pa. 1974) (prescriptive easement used to access single property could be used after subdivision of dominant estate; burden on servient estate not unreasonably increased); *Dennis v. French*, 369 A.2d 1386, 1388 (Vt. 1977) ("the owner of an easement cannot materially increase the burden of it upon the servient estate").

¶16 Nor did the trial court consider whether the physical character of the easement was changed when the Clarks began actually residing on the property. When considering whether a use of a prescriptive easement is permissible, courts typically look to whether the new use will require a change in the physical character of the easement. *See Wright*, 697 P.2d at 390 (easement altered from "ten-foot wide primitive road to a passageway which now is twenty-one feet wide" factor in determining new use was not permissible).

¶17 For the above reasons, there appear to be unresolved issues of fact concerning whether the change in use was one of nature or degree. We therefore conclude the trial court erred in granting summary judgment on this issue.[3]

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[3] The McBrides have also argued there can be no prescriptive easement because the use was initially permissive and permissive use cannot ripen into a prescriptive right. They are correct that a use that begins with permission is presumed to remain permissive unless there is some showing of hostility. *See Spaulding*, 218 Ariz. 196, ¶ 15. However, when permission has been expressly revoked, the use is clearly not permissive. *See LaRue v. Kosich*, 66 Ariz. 299, 307 (1947) (use that began with permission may become adverse); *Herrin v. O'Hern*, 275 P.3d 1231, ¶ 18 (Wash. App. 2012) (hostile use arises when permission is revoked). If, as the McBrides

Attorney Fees

¶18 Because we vacate the trial court's rulings dismissing the Clarks' claims of express and prescribed easement, we likewise vacate the ruling on attorney fees and costs. *See* A.R.S. §§ 12-341, 12-341.01 (costs and fees awarded to "successful party"). The Clarks have requested their attorney fees on appeal pursuant to A.R.S. § 12-1103.[4] Such an award, however, is discretionary, and the Clarks have not explained why this court should exercise its discretion in favor of such an award. *See Scottsdale Mem'l Health Sys., Inc. v. Clark*, 164 Ariz. 211, 215 (App. 1990); *cf. Munger Chadwick, P.L.C. v. Farwest Dev. & Constr. of the Sw., LLC*, 235 Ariz. 125, ¶ 14 (App. 2014) (applying § 12-341.01). Moreover, although the Clarks have succeeded in reversing the judgment of the trial court, they have not ultimately prevailed in the action. Accordingly, we deny their request for attorney fees at this time, but note that the ultimately prevailing party is not foreclosed from seeking its appellate fees in the trial court. *See A. Miner Contracting, Inc. v. Toho-Tolani Cty. Improvement Dist.*, 233 Ariz. 249, ¶ 45 (App. 2013). The Clarks have also requested their costs. Because such an award is mandatory under § 12-341, we grant their request, pending compliance with Rule 21, Ariz. R. Civ. App. P. The McBrides have requested their costs and fees, but they are not the successful party. §§ 12-341, 12-341.01.

Disposition

¶19 For the foregoing reasons, we vacate the judgment of the trial court. We remand for further proceedings consistent with this decision.

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have argued, the easement terminated in January 1997, the continued use of the Driveway was no longer permissive. In short, the McBrides cannot claim both that an easement was no longer in effect and that the same easement was a basis for permissive use.

[4]The Clarks have also requested fees pursuant to § 12-341.01, but in a quiet title action, "[t]he exclusive basis for attorneys' fees . . . lies in A.R.S. § 12-1103." *Lewis v. Pleasant Country, Ltd.*, 173 Ariz. 186, 195 (App. 1992).